Supreme Court, U.S.
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No. ____

In The

# Supreme Court of the United States

October Term, 1996

JOYCE E. HOLTZMAN,

*Petitioner,*

v.

THOMAS P. MULLON, individually and as Director of Veterans Administration Medical Center; DEPARTMENT OF VETERAN AFFAIRS, an agency of the United States of America; JESSE BROWN, as Secretary of Veteran Affairs; and REGENTS OF THE UNIVERSITY OF MINNESOTA, a "body corporate" under the Constitution of the State of Minnesota,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether a court of the United States may ignore an admission under Fed.R.Civ.P. 36 which has been neither amended nor withdrawn and may grant or affirm the grant of summary judgment to the admitting party based upon a factual determination directly contrary to that party's admission.

Whether a court of the United States may grant or affirm the grant of summary judgment by relying on the doctrine of *stare decisis* with respect to earlier decisions which evidence no factual analysis so as to preclude the introduction of evidence that a land grant university is autonomous of the State and wholly controls its own finances and to conclude that the university is an *alter ego* and instrumentality of the State so as to offer immunity to the university under the Eleventh Amendment.

Whether governmental employment protected by statute against discrimination based upon marital status and an interest in that employment stigmatized at the time of its termination by a charge of "patient abuse" constitute a protected "interest" subject to due process protection and the right to notice and a hearing prior to termination.

## PARTIES BELOW

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit and in the district court included Gene B. Mickelson in addition to the parties whose names appear in the caption.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on November 15, 1996.

## OPINIONS

The opinion of the United States Court of Appeals for the Eighth Circuit was not reported, but is set forth in the Appendix. (App.1-4). The unreported order of the district court granting summary judgment is set forth in the Appendix. (App.5-19). An earlier unreported order of the district court is set forth in the Appendix. (App.20-36).

## JURISDICTIONAL STATEMENT

The judgment of the Eighth Circuit was entered on November 15, 1996. In a timely fashion Petitioner petitioned for rehearing with a suggestion for rehearing *en banc*. The judgment denying rehearing and rehearing *en banc* was entered on February 3, 1997. This petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

The jurisdiction of the Eighth Circuit was invoked pursuant to 28 U.S.C. § 1291. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1331, 1337, 1361, 1367 and 1651(a).

## CONSTITUTION AND STATUTES

U.S. CONST. amend. V provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. XI provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Other relevant constitutional and relevant statutory provisions are set forth in the text of the Petition for Certiorari.

## STATEMENT OF THE CASE

Joyce E. Holtzman ("Holtzman") is a registered nurse. (App.6,21). In May 1981 Holtzman went to the personnel office at the University of Minnesota ("University"), saw a job posting for a registered nurse and completed an application for the available position. As a result, on June 1, 1981, Holtzman was hired as a general staff nurse "without compensation" ("WOC")[1] in the Therapeutics Clinic at the Veterans Administration Medical Center ("VAMC") at Minneapolis. (App.6,21).

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[1] Although Holtzman did not receive a wage directly from the Department of Veterans Affairs ("Department"), she did receive a wage and fringe benefits for her work.

Holtzman's work as a general staff nurse at the Therapeutics Clinic was supervised by Jordan L. Holtzman ("Dr. Holtzman"),[2] an employee both of the Department *and* of the Regents of the University ("Regents"). (App.21). As a general staff nurse, Holtzman filled out University timecards, received paychecks and Forms W-2 from the Regents, had federal and state income FICA taxes withheld by the Regents, was evaluated and awarded increases in compensation by the Regents, was appointed and reappointed by the Regents, participated in a retirement plan which the Regents made available *only* to their employees, (App.6-7,11-12,21), and was permitted to participate in a grievance proceeding available *only* to employees of the Regents. Holtzman assisted in research conducted by Dr. Holtzman and sponsored by the Regents. (App.6,21).

The Department accorded Holtzman WOC status. (App.6,21). The Department required Holtzman to complete its personnel forms, provided her with a job title and name tag, gave her a uniform, lab coat and equipment, paid in-service training, provided her with access to which premises and patient records, required her to assist with the treatment of patients for whom it was obligated to provide care, considered itself liable for her negligence, listed her in its computerized records as an "employee," treated her like an employee and deemed itself able to exercise authority to terminate her WOC status. (App.7-8).

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[2] Dr. Holtzman was and is Holtzman's husband.

Holtzman's work as a general staff nurse at the VAMC was more than satisfactory, (App.7,22), was without incident or complaint, was appreciated by patients and resulted in commendation by the Department and by Thomas P. Mullon ("Mullon"). Dr. Holtzman considered Holtzman's work to be essential to his own research and to be essential to the care of patients seen at the Therapeutics Clinic.[3]

When Dr. Holtzman returned to the Therapeutics Clinic after a July 1990 vacation, another nurse employed at the Therapeutics Clinic complained that, during Dr. Holtzman's vacation, Mary Gorman ("Gorman"), a clerk, had absented herself from work to "have her teeth cleaned" and that the absence "had significantly disrupted the [Therapeutics C]linic." (App.7). Gorman then proceeded to absent herself for an elective medical procedure and scheduled yet another medical procedure.[4] (App.7). Dr. Holtzman discussed the Therapeutics Clinic's problem with Gorman with the VAMC personnel service.

Based on the advice Dr. Holtzman received, on July 26, 1990, he met with Gorman, Greg Montury ("Montury")[5] and Nadine Steele ("Steele").[6] Dr. Holtzman informed Gorman that Gorman had been misusing her

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[3] When Holtzman's WOC status was terminated, Dr. Holtzman believed the termination "severely disrupted the care of patients" at the Therapeutics Clinic.

[4] The Therapeutics Clinic saw patients only three days per week, and Gorman chose those days to absent herself.

[5] Montury was a "shop steward" for the American Federation of Government Employees ("AFGE").

[6] Steele was a Department EEO counselor.

leave privileges. Gorman responded by verbally attacking Dr. Holtzman and by stating that "she did not belong in the [Therapeutics C]linic."

On July 27, 1990, Dr. Holtzman prepared a letter of admonishment and presented it to Gorman. (App.7). Later that day Dr. Holtzman was warned that Gorman would "get" him through Holtzman because of their "special relationship." (App.7). On July 31, 1990, Gorman complained to the AFGE. (App.7). Gorman also made a baseless complaint that Holtzman was involved in "patient abuse." (App.7). Gorman went on to file a formal grievance. (App.7).

On August 7, 1990, the Department notified Dr. Holtzman that it would convene a meeting with two agenda items: (1) dealing with Gorman's grievance and (2) discussing "other matters" involving Holtzman. Later that day the Department, without notice to Holtzman and without affording her an opportunity to be present, did convene a meeting. (App.7). The meeting quickly turned into a discussion of Holtzman.

Later that day Charles F. Moldow, M.D. ("Moldow") relayed an instruction to Dr. Holtzman from Robert E. Petzel, M.D. ("Petzel"), chief of staff at the VAMC and an "assistant dean" at the University, that Holtzman was not to return to work and was to talk to no one at the VAMC. (App.22). Petzel later called Moldow and Dr. Holtzman to his office and informed both that "patient abuse"[7] was

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[7] There was and is *no* basis for the charge; however, the charge is of such a nature as to destroy the professional reputation of a registered nurse.

the basis for Moldow's instruction that Holtzman was not to return to work. (App.7).

On August 16, 1990, Moldow, Petzel and Dr. Holtzman met in Moldow's office to discuss the situation. On August 21, 1990, the Department convened another meeting. Jane Nygard, a union steward, began by demanding Holtzman's termination. Penelope Trudeau ("Trudeau"), an assistant to Petzel, then told Dr. Holtzman that Holtzman "had no rights."

On August 28, 1990, Moldow, Petzel, Dr. Holtzman and Trudeau met in Petzel's office. Petzel stated that he had talked to the director of the VAMC[8] and had decided that Holtzman could no longer work as a general staff nurse at the VAMC because of her "special relationship" with Dr. Holtzman.

On September 18, 1990, Roger G. French ("French"), chief of personnel at the VAMC, wrote to Holtzman:

> This is to notify you that effective today we are terminating your WOC . . . status as a nurse at the [VAMC.] This is in accordance with WOC provisions that permit termination at any time by either party by written notice of such intent.
>
> The [Department] does not prohibit employment of relatives; however, where it is found that the working environment is disrupted or employees are unable to work in harmony, it is appropriate to discontinue such a

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[8] Although Mullon was the director, he was on leave and was working elsewhere at the time. It is unclear to whom Petzel actually had spoken – if anyone.

> relationship. In light of the duties and responsibilities of your husband, . . . we find it necessary to discontinue your WOC status.

(App.8,22). On September 28, 1990, Petzel wrote to French:

> Holtzman has been notified that her WOC status is ceased. She will no longer be part of the Therapeutics Clinic, Section, or Research efforts as they exist in this institution. She may work for other officials and other programs[9] in this institution, if appropriate.

On March 11, 1991, Holtzman and Dr. Holtzman met with Mullon. (App.8,23). At that meeting Mullon stated that he would resolve the matter. (App.8,23). On May 14, 1991, Holtzman's attorney wrote to Mullon:

> This matter was initially brought to the attention of the VA in discussions and meetings which occurred August and September 1990. . . . At [one] meeting, it was our contention that but for [Holtzman's] marital status she would not have been terminated.
>
> * * *
>
> Once this . . . was brought to the attention of the [Department] it was incumbent on the [Department] to conduct an EEO investigation. . . .

(App.23). On May 22, 1991, Mullon wrote to Holtzman:

> After reviewing the information you provided in discussing the matter of your reinstatement with other employees within the [VAMC,] we believe it is not appropriate at this time for

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[9] There were and are no other available positions.

> you to return to a position which would be supervised by your husband. . . .

(App.8,23).

On March 30, 1992, the Department caused a letter to be sent to Holtzman. The letter stated that the Department did not consider Holtzman an "employee" and would not consider her complaint. Holtzman then requested "right-to-sue" letters from the Department of Justice. Both the EEOC and the Department of Justice issued "right-to-sue" letters to Holtzman. Holtzman commenced a timely suit against Mullon, the Department, Jesse Brown and the Regents. Her amended complaint asserts claims of employment discrimination and constitutional deprivation against Mullon, the Department, Brown and the Regents.

On March 22, 1994, the district court dismissed Holtzman's Minnesota Human Rights Act ("MHRA") claim against the Regents based on Eleventh Amendment immunity.[10] (App.29-32). On September 5, 1995, the district court granted summary judgment dismissing Holtzman's due process, equal protection, section 1983 Title VII claim against the Regents.[11] (App.9-19). At the same time

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[10] The dismissal was for failure to state a claim. *See* Fed.R.Civ.P. 12(b)(6). The district court refused to provide Holtzman an opportunity to present evidence that the Regents were not an *alter ego* or instrumentality of the State of Minnesota and that any judgment would not be paid by the State of Minnesota.

[11] The district court ignored the Regents' formal "conclusive" admission that Holtzman was their "employee" and held that Holtzman was *not* an "employee" of the Regents.

the district court also granted summary judgment dismissing Holtzman's constitutional Title VII claims against Mullon, the Department and Brown. (App.12-19). Holtzman then perfected a timely appeal. (App.2).

## REASONS FOR ISSUING THE WRIT

### I. The Eighth Circuit Implicitly Interpreted Fed.R.Civ.P. 36 In Such A Way As To Contravene The Rule's Purpose And Sanctioned The District Court's Departure From The Accepted And Usual Course Of Judicial Proceedings So As To Call For An Exercise Of This Court's Power Of Supervision.

As part of discovery, Holtzman obtained an admission from the Regents:

> [The Regents admit] and allege that [they] administered a grant, that [Holtzman] was paid for her work at the [VAMC] through that grant, that [Holtzman] and [the Regents] had an employment relationship and [Holtzman] was an employee for some purposes but not for others.

The Regents did not move to withdraw or amend that admission, and the district court did not order the admission withdrawn or amended. When the Regents moved for summary judgment, Holtzman presented the admission to the district court, but the district court nevertheless held:

> To maintain a Title VII action Holtzman must demonstrate that an employment relationship existed . . . between her and the University. . . . Whether at work or "as an employee" under Title VII is a question of federal law and

is determined through application of a hybrid test based on the general common law of agency.

* * *

The University distributed checks and created a job-posting application process so Dr. Holtzman could spend his research grants. The University issued payroll checks when Holtzman submitted time cards for services she had performed. Holtzman was paid through Dr. Holtzman's research grants which he controlled. Her position was created through the University solely to create a payroll record. The grant funds were maintained by an independent organization, the Minnesota Medical Foundation, and transferred to University accounts in limited quantities only as needed. Holtzman performed her work at [the VAMC.] Her work was directed and supervised by Dr. Holtzman.

* * *

The tax treatment of Holtzman is the only factor which favors an employee and employer relationship. The University issued paychecks to Holtzman out of the research grants, with held taxes and paid social security taxes for her. This factor has little significance, however, as the University acted as payroll office for Dr. Holtzman's research grants. . . . The Court, having considered the working relationship as a whole and taking the evidence in favor of Holtzman, holds the relationship between Holtzman and the University is not one of employee and employer. Accordingly, the University is entitled to summary judgment as Holtzman cannot maintain an action against [the Regents] under Title VII.

(App.10-12). Even though the district court had ignored the Regents' admission, the Eighth Circuit affirmed, but it explained only:

> The University was not [Holtzman's] employer for purposes of Title VII. While *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105-06 (8th Cir. 1994) (noting no significant difference between this circuit's hybrid test and common law test of employer-employee status).

(App.3).

Fed.R.Civ.P. 36(b) provides: "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Fed.R.Civ.P. 56(c) (emphasis added) provides:

> [A] motion [for summary judgment] shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the date of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and *admissions* on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In 1970 the Advisory Committee noted:

> The new provisions give an admission a conclusively binding effect, for purposes only of the pending action, unless the admission is withdrawn or amended. . . . Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he

> has secured the admission, and the purpose of the rule is defeated.

Both the Eighth Circuit and the district court defeated the purpose of Rule 36. After Holtzman had secured the admission that she and the Regents "had an employment relationship" and that she "was an employee for some purposes," the district court and the Eighth Circuit found that she was not an "employee." (App.3-10-12).

At summary judgment Holtzman was required only to demonstrate that there was a genuine issue as to whether or not she was an "employee." Even though the Regents' admission "conclusively" established the fact of the employment relationship and even though Holtzman was entitled to – and did – rely on the admission, the district court and the Eighth Circuit ignored the provisions of Rule 36(b).

A party cannot create a "genuine dispute" as to whether a fact exists certainly is not entitled to obtain summary judgment based on a theory based on a contrary fact if the party has admitted the fact. *See* 8A C. Wright, A. Miller & R. Marcus, FEDERAL PRACTICE & PROCEDURE § 2264, 573-74 (2d ed. 1994). To permit what the district court and the Eighth Circuit did permit is to vitiate the express provision and the stated intent of Rule 36 and to so far depart from the accepted course of judicial proceedings as to require this Court's supervision.

## II. The Eight Circuit Rendered A Decision Concerning the Eleventh Amendment Immunity Of The Regents Which Conflicts With Its Own Earlier Decisions, With The Decisions Of Other Courts Of Appeals And With The Decisions Of This Court.

The district court held that the Eleventh Amendment provided the Regents with immunity against an action in

a court of the United States. (App.9-10,29,32). The Eighth Circuit affirmed by stating that "the [Regents are] a state instrumentality and thus protected by [E]leventh [A]mendment immunity." (App.3). Those decisions were made without reviewing any evidence and relied solely on earlier decisions (which were not premised on any factual evidence). (App.3,9-10,29-32). Those holdings are dependent upon a single premise: *stare decisis* deems the Regents an instrumentality of the State of Minnesota. (App.3,9-10,29-32). That premise is without factual basis, and neither holding should be allowed to stand.

If the Regents were an instrumentality, *i.e.*, a political subdivision, of the State of Minnesota, the legislature would have the power to dictate policy to the Regents. The legislature does *not* have that power.

First, the Regents came into existence *before* the State of Minnesota ever existed. In 1851 the Regents were incorporated under an "Act to incorporate the University of Minnesota, at the Falls of St. Anthony." Minn. L. 1851, ch.3. The Act provides:

> The proceeds of all land that may hereafter be granted by the United States to the Territory for the support of a University, shall be and remain a perpetual fund, to be called the "University Fund," the interest of which shall be appropriated to the support of a University, and no sectarian instruction shall be allowed in such University.
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> * * *
>
> The government of this University shall be vested in a Board of twelve Regents, who shall be elected by the Legislature as hereinafter provided.

* * *

> The Regents of the University and their successors in office shall constitute a body corporate, with the name and style of the "Regents of the University of Minnesota," with the right as such of suing and being sued, of contracting and being contracted with, of making and using a common seal, and altering the same at pleasure.
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> * * *
>
> The Regents shall have power, and it shall be their duty to enact laws for the government of the University. . . .
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> * * *
>
> The admission fee to the University and the charges for tuition in several departments thereof shall be regulated and prescribed by the Board of Regents. . . .
>
> * * *
>
> The Regents are authorized to expend that such portions of the fund, which by the provisions of this act, may come under their control, as they may deem expedient for the erection of suitable buildings, and the purchase of apparatus, a Library, and a Cabinet of Natural History; and the selection, management and control of all lands, which may hereafter be granted by Congress for the endowment of said University is hereby vested in the Board of Regents.

*Id.*, ch.3, §§ 2,4,7,9,12,15. On October 13, 1857, approximately six (6) years later, the people of Minnesota adopted a first constitution. That first constitution provided:

> All the rights, immunities, franchises, and endowments heretofore granted or conferred are hereby perpetuated unto the said university. . . .

MINN. CONST. art. VIII, § 3 (1857). On May 11, 1858, Congress admitted the State of Minnesota to the Union. 11 Stat. 285 (1858). On November 5, 1974, Minnesota amended its constitution. The amended constitution provides:

> All the rights, immunities, franchises, and endowments heretofore granted or conferred upon the university of Minnesota are perpetuated unto the university.

MINN. CONST. art. XIII, § 3 (1974).

> So the University in respect to its corporate status in government, was put beyond the power of the legislature by paramount law, the right to amend or repeal which exists only in the people themselves.

*State ex. rel. Univ. of Minn. v. Chase*, 175 Minn. 259, 265, 220 N.W. 951, 954 (1928). That would suggest that the Regents – who existed before the State of Minnesota came into being and who continue their existence with all previously existing powers – are *not* an *alter ego* or instrumentality of the State of Minnesota.

Second, as the Minnesota Supreme Court noted, a "claim against [a] university [in an identical situation is] not a claim against the state." *Id.* at 266, 220 N.W. at 955. In *Durham v. Parks*, 564 F. Supp. 244, 247 (D. Minn. 1983), the court stated:

> The laws of incorporation provided that the government of the University was vested in the

Board of Regents which is elected by the legislature. The University was created as a body corporate which has been described as a highly autonomous body. Early case law illustrates that, many times when the legislature enacted legislation with the purpose of exercising control over the management of the University, the legislation has been declared unconstitutional because of the body corporate status. In *University of Minnesota v. Chase*, the [Minnesota] Supreme Court said that article 3, section 3, of the constitution prohibited the legislature from supervising the finances of the University.

The territorial act of incorporation provided that the Regents of Minnesota have the power to sue or be sued, to contract or be contracted with, and to enact laws for the government of the University. Further, the [Minnesota] Supreme Court . . . has interpreted the territorial laws as giving the University the power to manage its finances without legislative approval, to construct dormitories on campus without legislative approval, and to have its decisions concerning the management of its educational affairs free from judicial review.

The [l]egislature has also acted to give the Board of Regents additional rights and control over the governing of the University. The University may accept, in trust or otherwise, any gift, grant, bequest or devise and may hold, manage or invest same at its discretion. Minn. Stat. § 137.01. Pursuant to section 137.022 . . . , the securities and cash previously held in the state treasury credited to the University was transferred to a permanent University fund. This fund was put in complete control of the Board of Regents subject only to the requirement that if the investment be in the bonds of

> any county, school district, city or town of this state and in first mortgage liens secured upon improved and cultivated farm lands, it must first be approved by the Board of Investment. MINN. CONST. art. XI, § 9. The University was granted power of eminent domain as a corporate entity to use at its discretion. It was determined by an opinion of the Attorney General in 1929 that the University of Minnesota may take such measures as are reasonably necessary to protect its property and cannot be controlled by the legislature.

The court went on:

> The University funding consists of tuition and fees, federal appropriations, state appropriations, federal grants and contracts, state grants and contracts, private gifts, grants and contracts, endowment income, investment income, and other income. Of the unrestricted funds, those over which the University has direct, unlimited control, state appropriations make up approximately 36% of the funding.

*Id.* at 248. Based upon that careful analysis, the court, after recognizing that the Minnesota constitution had "significantly put the University out of reach of the control of the state," that "the legislature ha[d] further removed itself from a position of control over the University and that "the fiscal responsibility for the University's actions does not lie with the state," held that the Eleventh Amendment did not shield the Regents from suit in a court of the United States. *Id.* at 248-49. After a similar, but more concise analysis, another court held that the Eleventh Amendment did not bar suit against the

Regents. *Perez-Lacey v. University of Minn.*, 655 F. Supp. 1066, 1068-69 (D. Minn. 1987).[12]

Third, although Minn. Stat. § 43A.17, subd.9, prohibits the state or any of its political subdivisions from paying a salary to an employee at a rate higher than ninety-five (95%) percent of the salary paid to the governor, employees at the University of Minnesota can be and are paid substantially higher salaries than is the governor.

Fourth, Minn. Stat. § 8.01 provides:

> The attorney general shall appear for the state in all causes in the supreme and federal courts wherein the state is directly interested; also in all civil causes of like nature in all other courts of the state whenever, in the attorney general's opinion, the interests of the state require it.

The attorney general's statutory duty requires him to "appear for the state" in all civil causes . . . whenever, in his opinion, the interests of the state require it" and implies that he is required to defend cases in which the people of the state may be interested. *Slezak v. Ousdigian*, 260 Minn. 303, 308, 110 N.W.2d 1, 6 (1961). The Regents are not the "state," and the attorney general is not required to and does not appear on behalf of the Regents. That is so because the state is *not* directly interested. The

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[12] It could well be argued that *Durham* and *Perez-Lacey* should collaterally estop the Regents from arguing that the Eleventh Amendment grants immunity from suit in a court of the United States.

Regents are entitled to and do employ their own attorneys. In fact, it is one of those attorneys who appeared in this case. (App.5,20).

Fifth, Minn. Stat. § 8.06 provides:

> The attorney general shall act as the attorney for all state officers and all boards or commissions created by law in all matters pertaining to their official duties.

As the attorney general himself notes, the Regents have the power to employ counsel of their choosing because the Regents are not "state officers [or] boards or commissions created by law." *Compare* Op. Minn. Att'y Gen. 618-A-1 (Jun. 17, 1944) (Regents have power to select counsel) *with* Op. Minn. Att'y Gen. 394-F (Dec. 29, 1936) (Soldiers' Home Board may not employ attorney) *and with* Op. Minn. Att'y Gen. 293-A-2 (May 16, 1928) (method for employment of legal counsel for state agencies and boards is exclusive). Finally, whenever the governor or the legislature attempts to impose policy to be followed in operating the University, the Regents take the position – successfully – that they are independent of such control. *See, e.g., Regents of Univ. of Minn. v. Lord*, 257 N.W.2d 796, 798 (Minn. 1977) ("power given to the university is separate and complete and is, by necessity, denied to the legislature"); *State ex rel. Univ. of Minn. v. Chase*, 175 Minn. at 265, 220 N.W. at 954 (Regents are "put beyond the power of the Legislature by paramount law" and have the "power or supervision over University finances").

The district court precluded Holtzman from offering evidence that the Regents were and are *not* the *alter ego* or an instrumentality of the State of Minnesota. Because the

Eleventh Amendment's primary purpose is to protect the state fisc, Holtzman was prepared to establish that, if the district court had permitted her action to proceed, Holtzman's suit against the Regents would have no direct impact on the state treasury. The conclusion which she would have asked the district court to reach would have been the same as the district court had reached earlier – in a civil rights action and because "the State of Minnesota would not be required to pay [the] judgment," the Eleventh Amendment has not provided immunities to the Regents. *Durham v. Parks*, 564 F. Supp. at 248-49.

The Eighth Circuit relied on the principle of *stare decisis* to resolve the issue of the Regents' Eleventh Amendment immunity. (App.3). The Eighth Circuit did so in the face of its own explicit holding that in the case of a "land grant" university, a plaintiff was entitled to present evidence concerning the university's autonomy and the source of funds from which a judgment would be paid. *See Sherman v. Curators of Univ. of Mo.*, 16 F.3d 860, 864 (8th Cir. 1994) (party is entitled to case-by-case analysis of the "autonomy" of university and its "sources of judgment funding"). Such a procedure would be consistent with this Court's analysis in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279-80 (1977), and with the decisions of other Courts of Appeals. *See, e.g., Soni v. Board of Trustees of Univ. of Tenn.*, 513 F.2d 347, 352 (6th Cir), *cert. denied*, 426 U.S. 919 (1976); *Laje v. R.E. Thomason Gen'l Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982).

The Eighth Circuit relied on *Treleven v. University of Minn.*, 73 F.3d 816, 818-19 (8th Cir. 1996). There the Eighth Circuit found that Eleventh Amendment immunity applied even though neither the district court nor the Eighth Circuit had engaged in any factual analysis. The

Eighth Circuit referred only to earlier cases which themselves had engaged in no factual analysis: *See, e.g., Richmond v. Board of Regents*, 957 F.2d 595, 598-99 (8th Cir. 1992) (Eighth Circuit not only failed to engage in factual analysis, but also failed to even list the factors to be considered); *Schuler v. University of Minn.*, 788 F.2d 510, 516 (8th Cir. 1986), *cert. denied*, 479 U.S. 1056 (1857) (no factual analysis). Both *Richmond* and *Schuler* relied on *Schuler v. University of Minn.*, 788 F.2d 510, 516 (8th Cir. 1986), *cert. denied*, 479 U.S. 1056 (1857) (no factual analysis). Both *Richmond* and *Schuler* relied on *Walstad* v. *University of Minn. Hosp.*, 442 F.2d 634, 641-42 (8th Cir. 1971) (analysis based primarily on state's non-waiver of tort immunity).[13]

Because the Regents are autonomous, the only relevant issue was whether the source of payment of damages would necessarily improve the state fisc. Because more than two-thirds (2/3) of their operating budget comes from sources other than state appropriations, *see* University of Minn., ANNUAL REPORT 20 (1993), a judgment would not *necessarily* be paid from state funds. Because a judgment need not be paid from state funds, the district court and the panel's holding that the Eleventh Amendment offers immunity to the Regents is error and is contrary to *Sherman*.

In addition, it is axiomatic that a sovereign may waive immunity. *E.g., Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). Although a state's waiver of sovereign immunity in its own courts is not a

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[13] The State of Minnesota has waived tort immunity by Minn. Stat. §§ 466.01 subd.1, and 466.02.

waiver of the Eleventh Amendment immunity in the courts of the United States, *see, e.g., Florida Dep't of Health & Rehabilitation Serv. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981), and although state law which designates an entity as a "body corporate" with a capacity to "sue and be sued" is not sufficient to constitute a specific waiver of Eleventh Amendment immunity, *id.* at 149-50, because Minnesota law provides that the Regents "shall constitute a body corporate" and may exercise "the right as such, of suing and being sued," Minn. L. 1851, ch.3, § 7, when the Regents invoked the right "of suing and being sued" to come before a court of the United States to pursue a "due process" claim under section 1983, *see Regents of Univ. of Minn. v. National Collegiate Athletic Ass'n*, 560 F.2d 352, 362 (8th Cir.), *cert. denied*, 434 U.S. 978 (1977), the Regents effectively waived any immunity the Eleventh Amendment might afford. It would be disingenuous to interpret the "sue and be sued" clause to mean that the Minnesota Constitution authorizes the Regents to *sue* both in a state court and in a district court of the United States, but authorizes a suit *against* the Regents only in a state court.

In *Seminole Tribe of Fla. v. Florida*, 116 S.Ct. 1114, 1124-29 (1996), the Supreme Court held that even when Congress unmistakably vests jurisdiction over an action in the district courts, Congress does not abrogate Eleventh Amendment immunity unless it acted pursuant to a constitutional provision. Here Congress not only authorized jurisdiction, but it also enacted Title VII under the aegis of section 5 of the Fourteenth Amendment. Therefore there can be no question but that the waiver of immunity as to Title VII ought to be valid. *See id.* at 1125.

There should be no question that the exercise of jurisdiction over Holtzman's pendent claim, *i.e.*, her Minnesota Human Rights Act claim, is also valid.

The Eighth Circuit's decision is in conflict with decisions of other Courts of Appeals. It is also in apparent conflict with this Court's decisions in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle* and in *Hopkins v. Clemson Agricultural College*, 221 U.S. 636 (1911) (land grant university not entitled to invoke Eleventh Amendment immunity). This Court therefore should exercise its powers of supervision.

## III. The District Court And The Eighth Circuit's Due Process Analysis Is In Conflict With Decisions Of This Court And With Decisions Of Other Courts Of Appeals.

The district court held that Holtzman's due process claim against the Regents under section 1983 failed because such a

> claim cannot be brought against states as they are not "persons" within the meaning of [section] 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989).

(App.9-10). The district court went on to confuse the issue of whether or not a state is a "person" with the issue of Eleventh Amendment immunity. (App.10). The Eighth Circuit affirmed. (App.3). That analysis is contrary to current interpretation of section 1983.

First, in *Monroe v. Pape*, 365 U.S. 167, 187-91 (1961), this Court held that a municipality was not a person under section 1983. In *Fitzpatrick v. Bitzer*, 427 U.S. 445,

452 (1976), this Court extended the *Monroe v. Pape* reasoning to conclude that section 1983 "could not have been intended to include States as party's defendant." In *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658, 690 (1978), this Court overruled *Monroe* and held that a municipality is a person under section 1983. In *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65-66 (1989), this Court concluded that "a state is not a 'person' within the meaning of [section] 1983." In so holding, this Court recognized that "the scope of the Eleventh Amendment and the scope of [section] 1983" were separate issues. *Id.* at 66.

In *Gay Student Serv. v. Texas A & M Univ.*, 612 F.2d 160, 163-64 (5th Cir.), *cert. denied*, 449 U.S. 1034 (1980), the Fifth Circuit stated:

> Consequently, an institution of higher learning, such as the University here involved, no longer enjoys absolute § 1983 immunity. *Monell* did not specifically mention universities as "persons" but there would appear to be no analytical difference in the operation of universities and other governing bodies such as cities. *See Goss v. San Jacinto Junior College*, 588 F.2d 96 (5th Cir. 1979), holding San Jacinto Junior College to be a "person" for purposes of § 1983.

*Accord, Gressley v. Deutsch*, 890 F. Supp. 1474, 1483-85 (D. Wyo. 1994) (Board of Trustees of University of Wyoming was "person acting under color of state law"). The district court rejected and the Eighth Circuit failed to acknowledge the holdings of *Gay Student Services* and of *Gressley* . The district court followed the authority of *Regents of Univ. of Minn. v. National Collegiate Athletic Ass'n*, 560 F.2d at 362-63 ("public universities and their corporate boards of regents, as political subdivisions of the state, may not

be sued under § 1983 since they are not persons within the meaning of § 1983"). The holding of *Regents of Univ. of Minn. v. National Collegiate Athletic Ass'n* is no longer valid; it was undermined by *Monell* – which found that a "political subdivision" of a state was a "person" under section 1983. Because the Regents are a "body corporate," an entity separate from the State of Minnesota itself, the Regents are a "person" under section 1983.

Second, the district court and the Eighth Circuit concluded that Holtzman had no protected "liberty interest" in her reputation. (App.3,17-18). In *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972), this Court stated:

> There might be cases in which a State refused to re-employ a person in such circumstances that interests in liberty would be implicated. But this is not such a case.
>
> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For [h]ere a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437; *Wieman v. Updegraff*, 344 U.S. 183, 191; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123; *United States v. Lovett*, 328 U.S. 303, 316-17. . . . In such a case, due process would accord an opportunity to refute the charge before university officials.

In *Siegert v. Gilley*, 501 U.S. 226, 233 (1991), this Court clarified its holding in *Board of Regents v. Roth* and recognized that only

> a governmental employer stigmatizing an employee . . . in the context of the employer discharging or failing to rehire [the employee] who claimed a liberty interest [in the employee's reputation] under the Fourteenth Amendment

engages in potentially actionable conduct. *Accord, Guerra v. Scruggs*, 942 F.2d 270, 278 (4th Cir. 1991); *Lyons v. Barrett*, 851 F.2d 406, 411-12 (D.C. Cir. 1988).

Holtzman was subjected to a false charge of "patient abuse." (App.7,18). That charge was the stated reason for Holtzman's discharge (by her governmental employers) and clearly stigmatized Holtzman, *i.e.*, a registered nurse. (App.7,18). It would be difficult to imagine a circumstance which would define an interest in reputation as a "liberty interest" more clearly. *See Board of Regents v. Roth*, 408 U.S. at 573; *Orloff v. Cleland*, 708 F.2d 372, 378 (9th Cir. 1983) (stigmatizing charges made at time of dismissal implicates liberty interests).

The Eighth Circuit also concluded that there was no "evidence of publication of the allegation of misconduct." (App.3). Publication is not required by *Board of Regents v. Roth*. Even if publication were required, the evidence before the district court and before the Eighth Circuit was uncontroverted: the charge of "patient abuse" was disseminated both to the AFGE and to Congressman Martin Sabo and Senator Paul Wellstone.[14]

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[14] Sabo is the Congressman who represents Holtzman, and Wellstone is one of the senators who represents her.

Third, in *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983), this Court recognized that when a statute places "substantive limitations on official discretion," the limitation "creates a protected liberty interest." Minn. Stat. § 363.03, subd.1 (emphasis added), provides:

> Except when based on a bona fide occupational qualification, it is an unfair employment practice:
>
> * * *
>
> (2) For an employer, because of race, color, creed, religion, national origin, sex, *marital status*, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age,
>
> * * *
>
> (b) to discharge an employee. . . .

That prohibition argument "marital status" discrimination outlaws an "antinepotism employment rule." *See Kraft, Inc. v. State*, 284 N.W.2d 386, 387-88 (Minn. 1979). The statutory ban explicitly provided Holtzman with a "liberty interest" in conditioned employment – without discharge because of her husband's position.

The district court found and the Eighth Circuit affirmed that Holtzman had no protectable "property interest in her employment." (App.3,16-17). Title VII, as amended, provides:

> All personnel actions affecting employees . . . in executive agencies as defined in

> section 105 of Title 5[15] (including employees and applicants for employment who are paid from nonappropriated funds[16]) . . . shall be made free from any discrimination based on . . . sex. . . .

42 U.S.C. § 2000e-16(a). The Eighth Circuit concluded Holtzman had no such interest because she was a WOC employee. (App.3). That ignores both state law and the FEDERAL PERSONNEL MANUAL.

Instruction 346 in the FEDERAL PERSONNEL MANUAL provides:

> Please note that the law does not prohibit relatives from working in the same agency, the same office, or even for each other. The agency may prohibit the employment of relatives in certain situations if it can justify this prohibition on conflict of interest grounds or other reasons which might be disruptive to work and interfere with the orderly operation of the agency (see C.F.R. § 732.201(a)). While agencies have some latitude in this area, the policies adopted must be consistent with EEO laws prohibiting discrimination on the basis of sex and marital status, as well as the merit system principals. Consequently, agency regulation should be drafted narrowly and take into account the characteristics of the agency's particular situation.

(App.14). Because Holtzman was aware of Instruction 346, she had contract rights. *See Pine River State Bank v. Metille*, 333 N.W.2d 622, 628-30 (Minn. 1983); *Orloff v.*

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[15] 5 U.S.C. § 105 defines "Executive agency" to include an "Executive department." 5 U.S.C. § 101 names the "Department of Veterans Affairs" as an "Executive department."

[16] Holtzman was a "WOC employee," *i.e.*, one paid from nonappropriated funds.

*Cleland*, 708 F.2d at 377. Holtzman was a party to an express agreement that she would be employed as long as there was available funding from grants to pay her wages. (App.17). Even if that contract were "terminable at will," it created a "property interest." There were funds available, and Holtzman was willing to continue to perform the contractually required services. Even though the employment relationship may have been "terminable at will," Holtzman nevertheless had a recognizable "property interest" as against the rest of the world. In addition, the Regents and the Department had in force a Memorandum of Agreement (Affiliation):

> The University of Minnesota Medical School will not discriminate against any employee of applicant for employment or registration in its course of study because of . . . sex. . . .

Holtzman was a third party beneficiary of that contract. That too created a "property interest."

If the Regents do constitute an *alter ego* of the state, Holtzman, as an employee of the Regents, would have been a "state employee." As a "state employee," Holtzman could not have been "reprimanded, discharged, suspended without pay or demoted except for just cause." Minn. Stat. § 43A.33, subd.1. That statute created a "property interest" in continued employment. It would also establish a procedure for discharge. *See* Minn. Stat. § 43A.33, subd.3. That procedure requires written notice, a grievance procedure and a right to appeal. No one afforded Holtzman the procedural rights to which she was entitled.

The conflict between the decision of the Eighth Circuit and the decisions of this Court and of other Courts of

Appeals calls for the exercise of this Court's power of supervision.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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*Attorney for Petitioner*

May 1, 1997.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 95-3677

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| | | |
|---|---|---|
| Joyce E. Holtzman,<br><br>Appellant,<br><br>v.<br><br>Thomas P. Mullon, as Director of Veterans Medical Center; Gene D. Mickelson, as EEO Counselor; The Regents of the University of Minnesota; Jesse Brown, as Secretary of Veterans Affairs,<br><br>Appellees. | * | Appeal from the United States District Court for the District of Minnesota<br><br>[UNPUBLISHED] |

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Submitted: October 25, 1996

Filed: November 15, 1996

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Before McMILLIAN, FAGG and BEAM, Circuit Judges.

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PER CURIAM.

Joyce E. Holtzman appeals from a final order entered in the District Court[1] for the District of Minnesota granting summary judgment in favor of the University of Minnesota (hereinafter the university) and several federal defendants in her employment discrimination and civil rights action. *Holtzman v. Mullon*, No. Civil 4-92-597 (D. Minn. Sept. 5, 1995) (granting summary judgment in favor of the university and federal defendants); *id.* (Mar. 22, 1994) (dismissing state civil rights claim against the university and denying petition for writ of mandamus). For reversal appellant argues the district court erred in (1) dismissing her federal and state civil rights claims against the university on the ground of eleventh amendment immunity, (2) dismissing her employment discrimination claims against the university because the university was not her employer, (3) granting summary judgment in favor of the federal defendants because she did not have a protected property or liberty interest and failed to make a prima facie case of unlawful employment discrimination on the basis of sex and marital status, and (4) denying her motion for partial summary judgment and petition for writ of mandamus against federal defendant Mickelson. For the reasons discussed below, we affirm the order of the district court.

The background facts are set forth in the district court orders. We agree with the district court's well-

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[1] The Honorable David S. Doty, United States District Judge for the District of Minnesota.

reasoned analysis. The university is a state instrumentality and thus protected by eleventh amendment immunity. *Treleven v. University of Minnesota*, 73 F.3d 816, 819 (8th Cir. 1996) (holding University of Minnesota is an arm of the state, citing prior circuit decisions). The university was not appellant's employer for purposes of Title VII. *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105-06 (8th Cir. 1994) (noting no significant difference between this circuit's hybrid test and common law test of employer-employee status). Appellant failed to make a prima facie case that she had been discharged on the basis of sex or marital status in violation of Title VII or the equal protection clause. Appellant did not have a constitutionally protected property interest in her employment as a "without compensation" employee under federal law, state law or the terms of the Department of Veterans Affairs appointment agreement. *Cf. Woods v. Milner*, 955 F.2d 436, 440 (6th Cir. 1992) (no protected property rights in position of temporary full-time employment where termination may occur at will). In the absence of any evidence of publication of the allegations of misconduct made against her in connection with her discharge, appellant failed to establish a constitutionally protected liberty interest in her reputation. Appellant failed to establish that her discharge was arbitrary or capricious in violation of substantive due process.

Finally, the district court did not abuse its discretion in denying appellant's motion for partial summary judgment and petition for writ of mandamus even though federal defendant Mickelson did not file a cross-motion for summary judgment. *See generally* 10A Charles A. Wright et al., Federal Practice and Procedure § 2720, at

29-30 (2d ed. 1983 & Supp. 1996) (summary judgment may be rendered in favor of opposing party even though no formal cross-motion made).

Accordingly, we affirm the order of the district court. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Joyce E. Holtzman,

Plaintiff,

v.

Thomas P. Mullon, individually and as Director of Veterans Administration Medical Center, Gene D. Mickelson, individually and as EEO Counselor, Department of Veteran Affairs, an agency of the United States of America, Jesse Brown, as Secretary of Veteran Affairs and Regents of the University of Minnesota,

Defendants.

Civil No. 4-92-597

**ORDER**

(Filed Sept. 5, 1995)

Robert A. Brunig, Esq., Thomas R. Sheran, Esq. and Moss and Barnett, 4800 Norwest Tower, 90 South Seventh Street, Minneapolis, MN 55402, counsel for plaintiff.

David L. Lillehaug, United States Attorney and Lonnie F. Bryan, Assistant United States Attorney, 234 United States Courthouse, 110 South Fourth Street, Minneapolis, MN 55401, counsel for defendants Thomas P. Mullon, Gene D. Mickelson, Jesse Brown and Department of Veteran Affairs.

Mark A. Bohnhorst, Associate General Counsel, University of Minnesota, 325 Morrill Hall, 100 Church Street S.E., Minneapolis, MN 55455, counsel for defendant Regents of the University of Minnesota.

Two motions are before the court. The Regents of the University of Minnesota and the federal defendants each seek summary judgment. Based on a review of the file, record and proceedings herein, and for the reasons stated below, both motions will be granted.

## BACKGROUND

Joyce Holtzman ("Holtzman") is a registered nurse married to Dr. Jordan Holtzman. ("Dr. Holtzman"). Dr. Holtzman is an employee of the Department of Veterans Affairs ("Department") and has a nonsalaried position as a Professor of Medicine and Pharmacology at the University of Minnesota Medical School. In 1981, Dr. Holtzman started the Therapeutics Clinic at the Veterans Affairs Medical Center. The clinic is operated through research grants made to Dr. Holtzman which are administered by the University of Minnesota ("University").

Dr. Holtzman was responsible for supervising the general staff nurses at the clinic. Holtzman was hired by Dr. Holtzman in 1981 to work for the clinic as a general staff nurse. She was employed without regard to the civil service classification laws, rules or regulations on a without compensation ("WOC") basis.[1] Dr. Holtzman supervised and directed Holtzman's work. She was paid out of the research grants and the University withheld taxes and paid social security taxes for her. Holtzman had the option to participate in health insurance and retirement

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[1] WOC appointees are typically medical employees who receive compensation from other sources for research that is done at a Veterans Affairs facility.

plans. The Department provided the place of work and equipment used by the clinic. Holtzman, as a WOC employee, was exempted from civil service requirements and was not otherwise treated as a federal employee.

Holtzman worked at the clinic for years without incident. In July 1990 the Holtzmans returned from vacation and discovered that Mary Gorman, a secretary at the clinic, had been absent from work without leave. Dr. Holtzman wrote a letter of admonishment and Gorman grieved the letter with the union. Gorman complained that Holtzman received preferential treatment from Dr. Holtzman and also made charges of patient abuse against Holtzman. Nurses who worked at the clinic also complained to the union about preferential treatment. Holtzman describes Gorman as a disgruntled employee, assigned to the clinic against her wishes, who was uncooperative and refused to comply with work assignments and Dr. Holtzman's supervision. It is alleged that Gorman vowed to get back at Dr. Holtzman through his wife.

On August 7, 1990, a meeting with the union was held and clinic employees expressed concerns about Holtzman. Dr. Holtzman dismissed the concerns and was irritated with Gorman. In a misguided attempt to inject humor into a tense situation, Dr. Holtzman said he would like to shoot Gorman and splatter her across the carpet. He subsequently apologized for his inappropriate behavior. On August 9, 1990, Dr. Robert Petzel, chief of staff at the VA medical center, met with Dr. Holtzman and Dr. Moldow. Dr. Petzel told Dr. Holtzman that his wife could no longer work for the Therapeutic Clinic. It is alleged that Dr. Petzel said Holtzman had abused patients and could not return to work.

On September 18, 1990, Holtzman received written notice from the Department that her WOC status as a nurse was terminated. The letter stated:

> This is to notify you that effective today, we are terminating your WOC (without compensation) status as a nurse at the VA Medical Center. This is in accordance with WOC provisions that permit termination at any time by either party by written notice of such intent.
>
> The VA does not prohibit employment of relatives. However, where it is found that the working environment is disrupted and employees are unable to work in harmony, it is appropriate to discontinue such a relationship. In light of the duties and responsibilities of your husband, Jordan Holtzman, M.D., Ph.D., we find it necessary to discontinue your WOC status at this time.

Holtzman denies that her marital relationship with Dr. Holtzman caused any disharmony among the clinic staff. Holtzman complains that the Department accepted unsubstantiated allegations concerning her disruptive impact without conducting an investigation or giving her an opportunity to be heard.

In the spring of 1991, Holtzman met with Thomas Mullon ("Mullon"), director of the VA medical center. Holtzman asserted she had been discriminated against based on her marital status. Mullon stated that he was not familiar with the case and would get back to Holtzman. Holtzman contends that Mullon told her he would resolve the matter. On May 22, 1991, Mullon informed Holtzman that, after reviewing the circumstances of her termination, the Department had concluded it was inappropriate for her to return to a position supervised by her

husband. However, Mullon indicated that other WOC positions were available at the VA medical center and urged Holtzman to consider those possibilities. Holtzman filed this action on June 19, 1992, alleging employment discrimination and due process and equal protection violations.

## DISCUSSION

On a motion for summary judgment, the evidence is viewed in favor of the nonmoving party and that party benefits from all justifiable inferences that can be drawn in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The nonmoving party cannot rest upon mere denials or allegations but must set forth specific facts, by affidavit or otherwise, sufficient to raise a material issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

### 1. Section 1983

Section 1983 of Title 42 creates no substantive rights, but provides only a remedy when rights secured by federal law or the Constitution are deprived under color of state law. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924 (1982). A § 1983 claim cannot be brought against states as they are not "persons" within the meaning of § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58

(1989). The eleventh amendment bars private persons from suing a state or one of its instrumentalities in federal court. The bar of the eleventh amendment is a jurisdictional one. Governmental entities that are considered a state instrumentality for eleventh amendment purposes are also protected from § 1983 actions in federal court.

Holtzman asserts the University violated her constitutionally guaranteed rights of due process and equal protection. Holtzman persists in her argument that the eleventh amendment does not apply because a suit against the University of Minnesota is not a suit against the state. The court rejected this argument in its order dated March 21, 1994. It is the law of this case that the eleventh amendment applies to the University of Minnesota. Accordingly, Holtzman may not maintain a § 1983 claim against the University of Minnesota.

**2. Title VII**

To maintain a Title VII action Holtzman must demonstrate that an employment relationship existed between her and the Department as well as between her and the University. The existence of an employment relationship between Holtzman and the Department has been assumed, but not decided, for purposes of this motion only. Holtzman also claims she had an employment relationship with the University. Whether a worker is an "employee" under Title VII is a question of federal law and is determined through application of a hybrid test

based on the general common law of agency. *Wilde v. County of Kandiyohi*, 15 F.3d 103 (8th Cir. 1994).[2]

The University distributed checks and created a job-posting application process so Dr. Holtzman could spend his research grants. The University issued payroll checks when Holtzman submitted time cards for services she had performed. Holtzman was paid through Dr. Holtzman's research grants which he controlled. Her position was created through the University solely to create a payroll record. The grant funds were maintained by an independent organization, the Minnesota Medical Foundation, and transferred to University accounts in limited quantities only as needed. Holtzman performed her work at VA Medical Center. Her work was directed and supervised by Dr. Holtzman. The University had no control over the means and manner of Holtzman's performance. Dr. Holtzman decided when and how long she worked.

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[2] The test focuses on the "extent of the employer's right to control the means and manner of the worker's performance." *Spirides v. Reinhardt*, 613 F.2d 826, 831 (D.C. Cir. 1979). The court considers a host of nonexclusive factors including the skill required; the source of the tools and instrumentalities; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *Wilde*, 15 F.3d at 106 (citation omitted). No single factor is conclusive; rather each must be weighed according to its significance in the particular case.

The tax treatment of Holtzman is the only factor which favors an employee and employer relationship. The University issued paychecks to Holtzman out of the research grants, withheld taxes and paid social security taxes for her. This factor has little significance, however, as the University acted as a payroll office for Dr. Holtzman's research grant. Holtzman did not receive vacation, sick pay, compensatory time or holiday pay which were afforded to other University employees. The court, having considered the working relationship as a whole and taking the evidence in favor of Holtzman, holds the relationship between Holtzman and the University is not one of employee and employer. Accordingly, the University is entitled to summary judgment as Holtzman cannot maintain an action against it under Title VII.

Title VII of the Civil Rights Act provides that all personnel actions affecting federal government employees "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). Holtzman claims defendants discriminated against her based on her sex and marital status. Defendants respond that discrimination based on marital status is not an actionable wrong under Title VII.

Discrimination based on marriage is not forbidden by the language of Title VII. The statute does not enumerate marital status as a protected class, and discrimination based on marital status alone does not violate the protected classification of sex. The implementing regulations of Title VII, however, show that the statute prohibits policies concerning marital status that discriminate on the basis of sex. Thus, a rule which forbids or restricts the employment of married women and which does not

apply to married men is discrimination based on sex under Title VII.

While marital status is not specified as a protected class under Title VII, discrimination based on marital status may be cognizable as sex discrimination where there is a disparate impact upon one sex. This form of Title VII discrimination is referred to as "sex-plus" discrimination and was first recognized in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).[3] In such a case, the plaintiff alleges that the employer disparately treated a subclass, e.g. married women, within a protected class. "The point behind the establishment of the sex-plus discrimination theory is to allow Title VII plaintiffs to survive summary judgment when the defendant employer does not discriminate against all members of the sex." *Arnett v. Aspin*, 846 F. Supp. 1234, 1240 (E.D. Pa. 1994).

Before a marriage-based sex discrimination claim can be upheld, some dissimilarity in treatment between the sexes must be shown. Holtzman claims she was terminated because she was married to her supervisor and was a female employee in a predominantly female job classification. Holtzman argues that defendants have permitted similar supervision arrangements between spouses employed at the VA Medical Center. The statute, however, does not protect Holtzman from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated on the basis of her sex or

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[3] In *Phillips*, the Supreme Court struck down defendant's policy of not accepting applications from women with preschool age children where the same restriction was not applied to men.

sex-plus marital status. Disparate treatment based on who a person is married to rather than if he or she was married at all presents a significant distinction in evaluating discrimination claims based on marital status. Title VII prohibits discrimination because of marital status where there is a disparate impact on one sex; it does not prohibit discrimination based on the identity of one's spouse.

Holtzman relies on the Federal Personnel Manual to support her claim of discrimination based on marital status. Instruction 346 provides in relevant part:

> Please note that the law does not prohibit relatives from working for the same agency, the same office or even for each other. An agency may prohibit the employment of relatives in certain situations if it can justify this prohibition on conflict of interest grounds or other reasons which might be disruptive to work and interfere with the orderly operation of the agency. . . . While agencies have some latitude in this area, the policies adopted must be consistent with EEO laws prohibiting discrimination on the basis of sex and marital status, as well as merit system principles. Consequently, agency regulations should be drafted narrowly and take into account the characteristics of the agency's particular situation.

The instructions contained in the Federal Personnel Manual do not in themselves provide an independent cause of action and cannot be considered in the absence of a law, rule, or regulation alleged to have been violated. *Mitchell v. Espy*, 845 F. Supp. 1474, 1492 (D. Kan. 1994) (citing *Phillips v. General Services Admin.*, 917 F.2d 1297, 1298

(Fed. Cir. 1990)). Thus, the proper focus is on Holtzman's claim of discrimination under Title VII.

Holtzman also asserts a claim of employment discrimination based on her sex. Holtzman contends defendants discriminated against her by presuming that, because she was a female in a predominantly female job classification, her marriage to a person having supervisory responsibility had a detrimental effect on the clinic. Defendants argue summary judgment is appropriate because Holtzman was replaced by another woman and, consequently, cannot establish a prima facie case under *McDonnell Douglas Corp v. Green,* 411 U.S. 792 (1973). The Eighth Circuit has recognized that it is "entirely conceivable" that a woman discharged and replaced by another woman "was the object of impermissible discrimination related to her gender." *Walker v. St. Anthony's Medical Center,* 881 F.2d 554, 558 (8th Cir. 1991). On the other hand, Holtzman's mere membership in the protected class does not permit an inference of sex discrimination. Rather, to withstand summary judgment Holtzman must point to specific facts which, if proven, tend to show that her discharge occurred under circumstances which permit an inference of unlawful discrimination. *Id.*

Having considered the evidence of record in favor of Holtzman, the court concludes the evidence is insufficient for a reasonable jury to find that sex was a determining factor in her discharge. While a jury could find that Holtzman was treated differently based on the identity and position of her spouse, there is no competent evidence from which a jury could find that Holtzman was

treated differently because of her sex. Holtzman's subjective beliefs that she was discriminated against based on her sex fall well short of showing sex was a determining factor behind her discharge. Accordingly, defendants are entitled to summary judgment on Holtzman's claim of discrimination in violation of Title VII.

**3. Constitutional Claims**

Holtzman argues she was deprived of a property interest in her job without due process. Holtzman contends the federal defendants violated her procedural due process rights by terminating her without providing advance notice and an opportunity to be heard. She also contends she had a right not to be terminated except for good cause. A government employee is entitled to procedural due process in connection with being discharged from employment only when she has been deprived of a constitutionally protected property or liberty interest. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-71 (1972). The Due Process Clause creates no property or liberty interests; it only extends procedural safeguards to interests "a person has already acquired in specific benefits." *Id.* at 576.

Holtzman's interest in her employment as a general staff nurse on a WOC basis does not rise to the level of a constitutionally protected property interest. The appointment agreement provided "This agreement may be terminated at any time by either party by written notice of such intent." There were no contractual or statutory limitations on the Department's ability to terminate Holtzman. Holtzman's employment was at will; thus, under

Minnesota law, she could be summarily dismissed at any time for any reason without advance notice.

Holtzman relies on Dr. Holtzman's statement that she would have her position as long as grant funds were available. Even accepting the unlikely premise that Dr. Holtzman had the authority to bind a federal agency, such a general statement regarding job permanence and job security does not alter her at-will status. Holtzman had no formal or implied security in her position as a general staff nurse. While Holtzman may have expected to continue to enjoy the benefits of her employment, she did not "have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577.[4] Holtzman cannot invoke the protections of the due process clause as she has failed to establish a constitutionally protected property right. *Accord Elkin v. Roudebush*, 564 F.2d 810 (8th Cir. 1977); *Woods v. Milner*, 955 F.3d 436 (6th Cir. 1992).[5]

Holtzman contends that her constitutionally protected liberty interest is implicated here. It is alleged that

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[4] Holtzman argues she is entitled to due process protections because the termination of her WOC basis in effect deprived her of a "paying" job at the University. Due process rights are not triggered where, as here, Holtzman lost a paid position to which she had no legitimate claim of entitlement.

[5] *See also Chernin v. Lyng*, 874 F.2d 501, 504 (8th Cir. 1989) ("It is certainly true that employees at will, by definition, have no claim of entitlement to continued employment enforceable against their employers. . . . If an employee has no independently cognizable claim of legal right against a governmental employer, then the Due Process Clause does not, by itself, supply one.") (quoting *Roth*, 408 U.S. at 577-78).

Dr. Petzel told Dr. Holtzman and Dr. Moldow that Holtzman had abused patients and could not return to work. Holtzman claims the statement has harmed her reputation and imposed a stigma that forecloses her freedom to take advantage of other employment opportunities. Holtzman must show that defendants, in connection with her discharge, publicly made allegedly untrue charges against her that would stigmatize her so as to seriously damage her standing in the community or foreclose her freedom to take advantage of other employment opportunities. *Shands v. City of Kennett*, 993 F.2d 1337, 1347 (8th Cir. 1993) (citing *Roth*, 408 U.S. at 573-74).

There is no evidence that defendants made public statements concerning Holtzman and her discharge. Taking the evidence in favor of Holtzman, the record shows the statement was made in the presence of Dr. Moldow and Dr. Holtzman. There is no evidence of additional publication. While the court agrees that the alleged statement had the potential to be stigmatizing, the evidence does not suggest that her standing in the community was seriously damaged or that she was foreclosed from taking advantage of other employment opportunities. In fact Holtzman had little difficulty securing subsequent employment as a nurse.[6] The court concludes that Holtzman has failed to establish that defendants deprived her of a constitutionally protected liberty interest.

Holtzman has failed to show that defendants violated her substantive due process rights. Holtzman claims her

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[6] Holtzman began work as a nurse at Group Health on March 12, 1991.

discharge was arbitrary and capricious in violation of her substantive due process rights. Holtzman argues defendants should have terminated Gorman who, according to Holtzman, caused disruption and discord within the clinic. To establish a substantive due process claim Holtzman must show the government action complained of is truly irrational. While Holtzman may well have been treated unfairly, the court concludes that the actions taken by defendants are insufficient to establish a constitutional violation. Moreover, because the evidence fails to show that Holtzman was treated differently because of her gender, her equal protection claim necessarily fails.

## CONCLUSION

Based on the foregoing, **IT IS HEREBY ORDERED** that the motions of summary judgment brought by the Regents of the University of Minnesota and the federal defendants are granted.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: September 5, 1995

/s/ David S. Doty
David S. Doty, Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Joyce E. Holtzmann,

Plaintiff,

v.

Thomas P. Mullon, individually and as Director of Veterans Administration Medical Center, Gene D. Mickelson, individually and as EEO Counselor, Department of Veteran Affairs, an agency of the United States of America and Regents of the University of Minnesota,

Defendants.

Civil No. 4-92-597

**ORDER**

(Filed Mar. 22, 1994)

Robert A. Brunig, Esq. and O'Connor & Hannan, 3800 IDS Tower, 80 South Eighth Street, Minneapolis, MN 55402, counsel for plaintiff.

David L. Lillehaug, United States Attorney and Lonnie F. Bryan, Assistant United States Attorney, 234 United States Courthouse, 110 South Fourth Street, Minneapolis, MN 55401, counsel for defendants Thomas P. Mullon, Gene D. Mickelson and Department of Veteran Affairs.

Mark A. Bohnhorst, Associate General Counsel, University of Minnesota, 325 Morrill Hall, 100 Church Street S.E., Minneapolis, MN 55455, counsel for defendant Regents of the University of Minnesota.

Two motions are before the court. The Regents of the University of Minnesota ("the Regents") move to dismiss

plaintiff's claim under the Minnesota Human Rights Act on the grounds that it is barred by the eleventh amendment. Plaintiff Joyce E. Holtzmann moves for partial summary judgment and seeks a writ of mandamus compelling defendant Gene D. Mickelson to comply with 29 C.F.R. § 1613.213. Based on a review of the file, record and proceedings herein, and for the reasons stated below, the court grants the Regents' motion to dismiss and denies plaintiff's motion for partial summary judgment.

## BACKGROUND

Joyce Holtzmann ("Holtzmann") is a registered nurse and the wife of Dr. Jordan Holtzmann. ("Dr. Holtzmann"). Dr. Holtzmann is an employee of the Department of Veterans Affairs and has a nonsalaried position as a Professor of Medicine and Pharmacology at the University of Minnesota Medical School. In 1981, Dr. Holtzmann started the Therapeutics Clinic at the Veterans Administration Medical Center. The clinic is operated through research grants made to Dr. Holtzmann and administered by the University of Minnesota ("University").

Holtzmann was hired in 1981 to work for the clinic as a general staff nurse on a without compensation ("WOC") basis.[1] Her work was directed and supervised by Dr. Holtzmann. The University paid Holtzmann a salary out of the grants and withheld taxes and paid social security

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[1] WOC appointees are typically medical employees who receive compensation from other sources for research that is done at a Veterans Affairs facility.

taxes for her. It also allowed Holtzmann to participate in health insurance and retirement plans. The Department of Veteran Affairs ("Department") provided the place of work and equipment used by the clinic. Holtzmann, as a WOC employee, was exempted from civil service requirements and was not otherwise treated as a federal employee. The Department did not pay Holtzmann any salary, wages or other form of compensation. Consequently, the Department did not make any deductions for income and social security taxes. Holtzmann did not receive sick leave, annual leave or other leave benefits. Holtzmann was not eligible for health or life insurance coverage, nor could she participate in federal pension programs.

Holtzmann worked at the clinic for years without incident. In July 1990, a secretary and two nurses who worked for the clinic complained that Holtzmann received preferential treatment. On August 7, 1990, Dr. Robert Petzel, chief of staff at the VA medical center, told Dr. Holtzmann that his wife could no longer work for the Therapeutic Clinic. On September 18, 1990, Holtzmann received written notice from the Department that her WOC status as a nurse was terminated. The Department reminded Holtzmann that WOC status may be terminated at any time by either party by written notice of such intent. The Department also indicated that employment of relatives is inappropriate where it disrupts the work environment.

The next day Holtzmann met with Dr. Petzel and protested that she had been discriminated against based on her sex and marital status. Holtzmann also met with Donald Schimmel ("Schimmel"), assistant chief of human

resources at the VA medical center. Holtzmann asked about the procedure for filing a complaint and Schimmel allegedly told her to "go to the EEOC." Schimmel did not provide Holtzmann with any written information or refer her to an Equal Employment Opportunity counselor.[2] Holtzmann met with Thomas Mullon ("Mullon"), director of the VA medical center, in the spring of 1991. Holtzmann asserted that she had been discriminated against based on her marital status. Mullon stated that he was not familiar with the case and would get back to Holtzmann. Mullon neither encouraged or discouraged Holtzmann from seeing an EEO counselor.[3]

On May 14, 1991, Holtzmann's counsel informed Mullon by letter that the Department was obligated to investigate Holtzmann's claim. The letter indicated that Holtzmann wanted to resolve the matter in an amicable fashion and to return to her former position. On May 22, 1991, Mullon informed Holtzmann that the Department, after reviewing the circumstances of her termination, had concluded that it was inappropriate for her to return to a position supervised by her husband. However, Mullon indicated that other WOC positions were available at the VA medical center and urged Holtzmann to consider those possibilities.

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[2] EEO counselors provide advice for employees of the Minneapolis VA medical center who believe that they may have been victims of unlawful discrimination.

[3] Holtzmann contends that Mullon told her he would resolve the matter and that she need not see an EEO counselor. On a motion for summary judgment, however, the court must view the facts in favor of the nonmoving party.

On May 29, 1991, Holtzmann filed a charge with the Equal Employment Opportunity Commission. On May 31, 1991, Holtzmann's counsel registered a written complaint with the EEO office at the Department of Veteran Affairs. The complaint stated that Holtzmann had been discharged from her employment at the clinic because of her sex and marital status. The complaint was referred to the local EEO office and Holtzmann was told she needed to consult with an EEO counselor before her complaint could be processed.

On July 10, 1991, Mullon sent a memorandum to Holtzmann acknowledging receipt of her discrimination complaint on June 27, 1991. The memorandum stated that if Holtzmann's complaint was accepted, it would be investigated and perhaps resolved on an informal basis. However, the memorandum also stated that if the complaint was rejected, it was considered a final agency decision. Mullon informed Holtzmann of various rights and the time limits for exercising those rights. Specifically, the memorandum discussed her rights to a hearing, to appeal to the EEOC and to file a civil action in the United States district court. In a separate letter dated the same day, Mullon asked Holtzmann to explain why she failed to contact an EEO counselor within 30 days of the alleged discriminatory incident.

Holtzmann's counsel responded that the complaint was brought to Mullon's attention in the spring of 1991 and that the Department had notice of the complaint in September 1990. Holtzmann's counsel implored the Department to investigate the complaint as directed by federal regulations. On August 1, 1991, Mullon informed Holtzmann that the complaint might not be acceptable for

processing because she failed to contact an EEO counselor within 30 days. Holtzmann's counsel wrote to the Department's General Counsel indicating that the Department had actual notice within 30 days and protesting the agency's failure to inform Holtzmann that she had to contact an EEO officer and of her right to file a complaint. On September 7, 1991, Mullon referred Holtzmann to an EEO counselor to explain her initial failure to contact an EEO counselor.

Holtzmann met with Gene Mickelson ("Mickelson"), an EEO counselor, on October 9, 1991. The purpose of the counseling was to determine if Holtzmann had a good reason for not filing her complaint against the Department in a timely fashion. Mickelson asked Holtzmann why she failed to contact an EEO counselor within 30 days of the alleged discriminatory act. Holtzmann allegedly responded that she contacted an EEO counselor at the University of Minnesota and was still working with that counselor.[4] Mickelson prepared a written report after the meeting but apparently did not furnish a copy to Holtzmann.

On March 5, 1992, Holtzmann's counsel complained to Mullon about the Department's inaction and failure to comply with federal EEOC regulations. On March 30, 1992, Holtzmann was notified by letter that the Department had rejected her complaint for failure to state a claim. Holtzmann was informed that WOC employees were not considered employees of the Department for

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[4] Mickelson's account of the counseling session varies greatly from Holtzmann's version. At this juncture, however, the court must accept Mickelson's description as true.

Title VII purposes. The Department advised Holtzmann that the letter constituted the final decision of the agency and that she had 90 days to either appeal the decision or file a civil action in the United States district court. Holtzmann filed this action on June 19, 1992, alleging employment discrimination and due process violations and seeking a writ of mandamus compelling the Department to comply with 29 C.F.R. § 1613.213.

## DISCUSSION

As a threshold issue in every federal case, the court must determine whether it has subject matter jurisdiction over an action. "Jurisdictional issues, whether they involve questions of law or of fact, are for the court to decide." *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990) (citation omitted). The court has authority to consider matters outside the pleadings when subject matter jurisdiction is challenged without converting the motion to one for summary judgment. *Id.* If the court is without jurisdiction, it must dismiss the action.

The court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). This standard mirrors the standard for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), which requires the trial court to enter judgment as a matter of law if there can be but one reasonable conclusion as to the verdict. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Id.* at 249.

On a motion for summary judgment, the court views the evidence in favor of the nonmoving party and gives that party the benefit of all justifiable inferences that can be drawn in her favor. *Id.* at 250. The nonmoving party, however, cannot rest upon mere denials or allegations in the pleadings. Nor may the nonmoving party simply argue facts supporting its claim will be developed later or at trial. Rather the nonmoving party must set forth specific facts, by affidavit or otherwise, sufficient to raise a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted. *See Anderson*, 477 U.S. at 250-51. If a plaintiff fails to support an essential element of a claim, however, summary judgment must issue because a complete failure of proof regarding an essential element renders all other facts immaterial. *Celotex*, 477 U.S. at 322-23.

**1. Motion to Dismiss**

The Regents move to dismiss plaintiff's claim under the Minnesota Human Rights Act against the University of Minnesota, arguing that it is barred by the eleventh amendment. Holtzmann maintains that because the Regents answered the original complaint, the eleventh amendment has been waived as a defense.

**A. Procedural Background**

In the original complaint dated June 19, 1992, Holtzmann asserted federal question jurisdiction pursuant to 28 U.S.C. § 1331 and alleged employment discrimination and due process violations. Specifically, Holtzmann alleged that the Regents had engaged in "prohibited discrimination in employment" by terminating her "on account of her sex and marital status." No statutory authority was pled. The Regents filed a separate answer, asserting lack of subject matter jurisdiction, failure to state a claim and immunity.

The Regents moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) on the grounds that the University of Minnesota did not participate in Holtzmann's termination and that the University of Minnesota was not a joint employer within the meaning of Title VII. The court denied the motion. *Holtzmann v. Mullon*, No.4-92-597 (D. Minn. January 29, 1993). Holtzmann was subsequently permitted leave to file and serve an amended complaint.

Holtzmann served the first amended complaint by mail on June 4, 1993. Holtzmann now alleges that the Regents terminated her and refused to reinstate her "on account of her sex and marital status . . . in violation of Title VII in (sic) the Minnesota Human Rights Act." Holtzmann also asserted supplemental jurisdiction under 28 U.S.C. § 1367. On June 17, 1993, the Regents filed a motion to dismiss the Minnesota Human Rights Act ("MHRA") claim on eleventh amendment grounds.

**B. Availability of Immunity Defense**

Despite the fact that the original complaint did not refer to the MHRA or assert supplemental jurisdiction, Holtzmann contends that it was obvious she was seeking relief under the MHRA because discrimination based on "marital status" was alleged and the MHRA expressly prohibits such discrimination. The court disagrees. The first claim of discrimination in violation of the MHRA appears in the first amended complaint; the original complaint did not allege a cause of action under the MHRA.[5] It was not until the first amended complaint was filed that the eleventh amendment became a defense available to the Regents.[6] The Regents properly asserted immunity under the eleventh amendment at the first opportunity in a motion to dismiss the MHRA claim. Moreover, because the eleventh amendment relates to subject matter jurisdiction, it can be raised by the court or the parties at any time. Fed. R. Civ. P. 12(h)(3).

**C. Eleventh Amendment**

The eleventh amendment bars private entities from suing a state or one of its instrumentalities in federal

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[5] The court notes that the only exhibit attached to the original complaint was Holtzmann's right to sue letter from the EEOC.

[6] It is well-established that Congress abrogated the eleventh amendment by expressly providing for suits against states in Title VII. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

court.[7] The bar imposed is a jurisdictional one. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984). The eleventh amendment is not absolute. Congress may abrogate the states' sovereign immunity or a state may consent to suit in federal court. *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990). Absent consent or abrogation, however, the eleventh amendment deprives federal courts of subject matter jurisdiction over actions against a state.

Holtzmann claims that the eleventh amendment does not apply because a suit against the University of Minnesota is not a suit against the state. The court recognizes that state-connected entities or political subdivisions do not always share in their state's immunity. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). However, the Eighth Circuit has consistently held that the University of Minnesota "is a state instrumentality for eleventh amendment purposes." *Schuler v. University of Minnesota*, 788 F.2d 510, 516 (8th Cir. 1986) (per curiam) (citing *Walstad v. University of Minnesota*

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[7] The eleventh amendment provides:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Although the amendment's language limits the bar to citizens of another state, the Supreme Court has long held that the amendment prohibits a federal court from entertaining a suit brought by a citizen against his or her own state absent the state's consent to suit. *Hans v. Louisiana*, 134 U.S. 1 (1890).

*Hospitals*, 442 F.2d 634, 641-42 (8th Cir. 1971)).[8] Thus, the court concludes that the Regents of the University of Minnesota are entitled to immunity from suit in federal court on Holtzmann's MHRA claim.

Holtzmann also contends that the recent decision in *Sherman v. Curators of the Univ. of Missouri*, No. 93-2748, 1994 WL 38976 (8th Cir. Feb. 14, 1994), suggests a contrary result. In *Sherman*, the Eighth Circuit reaffirmed the framework for deciding whether the eleventh amendment applies to a subdivision of the state, including state universities. *See, e.g., Greenwood v. Ross*, 778 F.2d 448, 453 (8th Cir. 1985).[9] The Eighth Circuit emphasized that federal courts must determine whether a particular state university is immune from suit under the eleventh amendment on a case-by-case basis. The Eighth Circuit held that the *Greenwood* test had not been applied to the University of Missouri and remanded the case to the district court. The Eighth Circuit did not, however, call into question its precedent concerning the University of

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[8] *Accord Haugen v. University of Minnesota*, No. 91-2049 (8th Cir. Sept. 23, 1991); *Deli v. University of Minnesota*, No. 3-93-501 (D.Minn. Nov. 30, 1993).

[9] To determine the applicability of the eleventh amendment, "[c]ourts typically look at the degree of local autonomy and control and most importantly whether the funds to pay any award will be derived from the state treasury." *Greenwood*, 778 F.2d at 453 (quoting *Laje v. R.E. Thomason Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982)).

Minnesota.[10] Nor did the Eighth Circuit purport to overrule its decisions concerning the status of other state universities. Without direct guidance from the Eighth Circuit, the court cannot conclude that *Sherman* was intended to undermine existing precedent concerning the eleventh amendment status of the University of Minnesota.

**2. Writ of Mandamus**

Holtzmann contends that she is entitled to a writ of mandamus compelling Gene D. Mickelson to comply with 29 C.F.R. § 1613.213. That regulation provides in relevant part:

> The agency shall require that an aggrieved person who believes that he or she was discriminated against because of race, color, religion, sex, national origin, age or handicapping condition consult with an Equal Employment Opportunity Counselor to try to resolve the matter. The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he or she believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the issues in the matter; to keep a record of counseling activities . . . and, when advised that a complaint of discrimination has

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[10] In fact, the Eighth Circuit cited *Walstad* as a decision holding a state university immune from suit under the eleventh amendment. *Sherman*, 1994 WL 38976 at *4 n.3. The court also notes that the Eighth Circuit rendered its decision in *Schuler* after it had decided *Greenwood*.

> been accepted from an aggrieved person, to submit a written report to the Equal Employment Opportunity Officer, with a copy to the aggrieved person, summarizing the counselor's actions and advice both to the agency and the aggrieved person concerning the issues in the matter. . . . If, within 21 days, the matter has not been resolved to the satisfaction of the aggrieved person, that person shall be immediately informed in writing . . . of his or her right to file a complaint of discrimination.

Holtzmann contends that the Department failed to put her in contact with an EEO counselor when it became aware of her complaint in September 1990. Holtzmann also contends that the EEO counselor, Gene Mickelson, failed to investigate her complaint and did not seek an informal resolution. Holtzmann seeks a writ of mandamus compelling Mickelson to conduct an investigation and submit a written report summarizing his actions and advice.[11]

The writ of mandamus is a "drastic" step to be used only in "extraordinary" circumstances. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33. 34-35 (1980). "The extraordinary remedy of mandamus under 28 U.S.C. § 1361 will issue only to compel the performance of a 'clear nondiscretionary duty.' " *Pittson Coal Group v. Sebben*, 488 U.S. 105, 121 (1988) (quoting *Heckler v. Ringer*, 466 U.S. 602, 616 (1984)). Mandamus is appropriate "only

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[11] The mandamus statute provides that "[t]he district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed the plaintiff." 28 U.S.C. § 1361.

when the plaintiff has a clear right to relief, the defendant has a clear duty to perform the act in question, and the plaintiff has no adequate alternative remedy." *Borntrager v. Stevas*, 772 F.2d 419, 420 (8th Cir.), *cert. denied*, 474 U.S. 1008 (1985). Issuance of the writ is in large part committed to the court's discretion. *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976).

The circumstances of this case do not justify issuance of a writ of mandamus. Mandamus is unavailable here because Holtzmann has a fully adequate alternative remedy, namely a civil action in this court. The parties dispute whether the duty imposed by 29 C.F.R. § 1613.213 is a clear nondiscretionary duty. Having concluded that Holtzmann has an alternative remedy, the court need not decide the nature of the duty at issue in this case. The court notes that, even if the duty were mandatory, Holtzmann has failed to show she has a clear right to the relief she seeks.[12] Holtzmann contends that the Department failed to investigate her complaint. Although it may have failed to comply with 29 C.F.R. § 1613.213 in the first instance, the Department fulfilled its regulatory obligations after Holtzmann registered a written complaint with the Department's EEO office.[13] That is not to say that the

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[12] In denying the writ of mandamus, the court neither reached nor decided the issue of whether Holtzmann is a federal employee entitled to Title VII protection.

[13] Holtzmann protests that Mickelson did not provide her with a copy of his written report. The regulation requires the EEO counselor to prepare a written report, with a copy to the aggrieved person, when he or she is advised that a complaint has been accepted. Because Holtzmann's complaint was rejected, Mickelson was not obligated to provide a copy of his report to her.

federal defendants did all they could to aid Holtzmann, but that is not what the regulation requires.

## CONCLUSION

The court concludes that the eleventh amendment deprives it of jurisdiction over Holtzmann's MHRA claim against the Regents of the University of Minnesota. The availability of an alternative remedy mandates denial of mandamus relief in this case. The court also holds that because an alternative remedy exists, summary judgment is appropriate in favor of the Department and Mickelson on count 3 of the first amended complaint. The federal defendants argue that summary judgment should be granted in their favor on all counts. Specifically, the federal defendants contend that Holtzmann is not a federal employee entitled to the protection of Title VII. The court cannot decide the issue at this time, however, because the federal defendants have not properly moved for summary judgment.

Accordingly, **IT IS HEREBY ORDERED** that the motion of the Regents of the University of Minnesota is granted and plaintiff's MHRA claim is dismissed against the Regents of the University of Minnesota. **IT IS FURTHER ORDERED** that plaintiff's motion for partial summary judgment is denied and that summary judgment is granted in favor of defendants Department of Veteran Affairs and Gene D. Mickelson on Count 3 of the first amended complaint.

Dated: March 21, 1994

/s/ David S. Doty
David S. Doty, Judge
United States District Court